***United States Court of Appeals***

***for the Second Circuit***


# AMICUS BRIEF

75-4049 B Pls 4/9

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 75-4049

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AIR LINE PILOTS ASSOCIATION, INT'L.,

Petitioner,

-and-

THE STATE OF NEW YORK,

Intervenor,

-against-

CIVIL AERONAUTICS BOARD,

Respondent.

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ON PETITION TO REVIEW AN ORDER OF
THE CIVIL AERONAUTICS BOARD

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# BRIEF FOR ~~INTERVENOR~~ AMICUS THE STATE OF NEW YORK

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# BRIEF FOR INTERVENOR THE STATE OF NEW YORK

## STATEMENT OF ISSUES

Whether the Civil Aeronautics Board by rejecting the embargo notices of airlines on certain hazardous materials has wrongfully interfered with the statutory responsibility of every air carrier to refuse transportation of passengers or property when in the judgment of the carrier, such transportation would or might be inimical to the safety of a flight.

## INTEREST OF THE STATE OF NEW YORK

The widespread shipment of nuclear materials as well as other hazardous substances through the New York City metropolitan region seriously threatens a number of fundamental interests of the State of New York and its inhabitants in terms of health and safety. A single serious accident involving plutonium could disperse trillions of lethal particles and consequently kill hundreds of thousands of New York residents and contaminate for long periods of time large sections of the densely-populated metropolitan region. Even a less severe accident necessitating the close of Kennedy Airport would be devastating to the safety and livelihood of numerous New Yorkers.

The Attorney General has made a demand of the Department of State, the Nuclear Regulatory Commission, the U.S. Department of Transportation, the Federal Aviation Administration and the Civil Aeronautics Board to present a statement of the review procedures utilized in promulgating the relevant regulations and rules of transportation of such materials as mandated by the National Environmental Policy Act, 42 U.S.C. § 4332. If responses to these inquiries are unsatisfactory the State of New York will pursue the matter of the inadequacy of the environmental review in court in a separate action.

## THE ORDER BELOW

Plaintiffs are appealing Order 75-2-127 of the Civil Aeronautics Board (hereafter the "CAB"), ordering them, over their objection, to carry on their aircraft certain hazardous materials including plutonium and plutonium oxide.

## FACTS

We adopt the statement of facts set forth in the petitioners' brief.

## ARGUMENT

THE CIVIL AERONAUTICS BOARD IMPROPERLY SUBSTITUTED ITS JUDGMENT FOR THAT OF THE PILOTS AND AIRLINES AS TO THE SEVERE HAZARDS THREATENED BY THE TRANSPORTATION BY AIR OF PLUTONIUM AND OTHER HAZARDOUS MATERIALS, AND REFUSED TO RECOGNIZE THE STATUTORY RESPONSIBILITY OF EVERY AIR CARRIER TO REFUSE TRANSPORTATION OF PASSENGERS OR PROPERTY WHEN IN THE JUDGMENT OF THE PILOT AND CARRIER, SUCH TRANSPORTATION WOULD OR MIGHT BE INIMICAL TO THE SAFETY OF A FLIGHT.

This case raises issues of the most serious nature involving the rights of airlines and their pilots to protect themselves, their passengers and the public from extraordinary risks to health and indeed to life.

The Civil Aeronautics Board ("CAB") considers the Department of Transportation ("DOT") and the Federal Aviation Administration ("FAA") to be the sole entities to have safety responsibilities over the shipment of various hazardous materials including plutonium and other radioactive cargoes. Therefore, in the present case, the CAB concluded that certified air carriers and their pilots must accept radioactive materials for carriage since the DOT and FAA maintain that radioactive materials "can, when appropriately packaged and labeled in accordance with FAA regulations, be transported by air without materially jeopardizing health or safety." See Motion For Stay, Appendix A.

The CAB thereby committed a substantial error of law, because its directive ran afoul of the air carriers' and airline pilots' fundamental and inherent right to exceed DOT/FAA safety requirements and to decline to accept freight which is in their judgment inimical to the safety of a flight. This legal right of a common carrier to refuse objectionable cargo and customers has long been recognized at common law as being coextensive with the carrier's duty to provide its passengers with the utmost care for their safety. Williams v. Transworld Airlines, Inc., 369 F. Supp. 797, 805 (S.D.N.Y. 1974), aff'd ____F. 2d____ (1/10/75, 2nd Cir.), slip op. at 1269. "TWA was and is required to perform its services with the highest possible degree of

safety in the public interest. . . ." Accord, California Powder Works v. Atlantic & P.R. Co., 45 P. 691 at 692, 113 Cal. 329 (1896) A common carrier is not bound to receive dangerous articles as nitroglycerin, dynamite, gunpowder, aqua fortis, oil vitriol, matches, etc. Pearson v. Duane, 71 U.S. (4 Wall.) 605 (1866); Jencks v. Coleman, 13 Fed. Cas. No. 7,258, at 443-444, 2 Sumn. 221 (C.C.R. 1, 1835) (per Story, J.). "Where articles of an extraordinary character are offered, a carrier is not bound to accept them . . ." Chicago, R.I. & P. Ry. Co. v. Lawton Refining Co., 253 F. 705 at 707 (8th Cir., 1918). This right is now statutorily guaranteed by § 1111 of the Federal Aviation Act of 1958, 49 U.S.C. 1511:

> ". . . any air carrier is authorized to refuse transportation to a passenger or to refuse to transport property when in the opinion of the air carrier, such transportation would or might be inimical to safety of flight."

Section 1111 was reenacted only six months ago by § 204 of the Air Transportation Security Act of 1974, 49 U.S.C. 1511, Pub. L. 93-366, 92nd. Cong., 2nd. Sess., Aug. 5, 1974. According to the Congressional Conference Report, No. 93-1194, July 12, 1974 U.S. Code Cong. and Admin. News 2814, 2828, Section 1111's reenactment was to reaffirm the authority of an air carrier to "refuse transportation of a person or property when the carrier feels that such transportation might be inimical to safety of flight." As the court held in Williams v. TWA, supra, slip op. at 1272, ". . . Congress did not intend

that the provisions of Section 1374 would limit or render inoperative the provisions of Section 1511."[1]

The DOT/FAA is authorized by § 1111 to formulate regulations requiring the rejection of some or all hazardous articles by air carriers. In fact, § 108 of the Hazardous Material Transportation Act, 49 U.S.C. § 1807, orders the issuance of regulations pertaining to the carriage of radioactive materials on passenger aircraft by May 4, 1975.[2] Present DOT/FAA regulations only allow acceptance of these dangerous goods after they have been properly packaged and labelled and inspected by the carriers. See, e.g., FAR 103.3(a) and 103.4(a), 14 C.F.R. §§ 103.3(a) and 103.4(a), as amended Feb. 4, 1975, 40 Fed. Reg. 5141.

The CAB relies upon the obligation of the airlines to provide adequate service in its finding in Order 75-2-127



1. 49 U.S.C. 1374(b) states in part: "No air carrier. . . shall make. . . any undue or unreasonable preference . . . to any particular person, port, locality, or description of traffic in air transportation in any respect. . . or subject [the same] to any unjust discrimination. . . ."

2. "The Federal Aviation Administration has given notice that it is considering amending Part 103 of the Federal Aviation Regulations to limit the carriage of radioactive materials on passenger-carrying aircraft to

Footnote continued

2. those intended for use in, or incident to, research or medical diagnosis or treatment and to those shipments of radioactive materials that meet requirements of 49 CFR 172 and 173 which exempt them from packaging, marketing and labeling requirements for shipment by rail express and which are now exempt from applicability of Part 103. The proposed amendments would implement Section 108 of the Transportation Safety Act of 1974 (Public Law 93-633) in the light of views presented by interested persons at a public hearing held by the F.A.A. on January 20, 1975. As noted at 40 F.R. 5168, comments are due on or before March 10, 1975." 3 C.C.H. Aviation Law Repts., No. 593, at 4, February 17, 1975.

directing airlines to carry radioactive cargoes. But, in fact, airlines are not required to carry all hazardous cargoes by either the CAB rules or the Federal Aviation Act. Indeed CAB's tariff regulations, 14 C.F.R. 221.104 and 221.38(a)(5), expressly recognize that a carrier need not accept all hazardous cargo in order to be in compliance with CAB embargo provisions. Furthermore, § 404(a) of the Federal Aviation Act, 49 U.S.C. 1374(a) states in providing service: "It shall be the duty of every air carrier to provide . . . safe and adequate service."

As a supplement to the above, in considering the needs of service 49 U.S.C. § 1421(b) declares:

> "In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest and to any differences between air transportation and other air commerce."

In view of the unique nature of air transportation, one must take into account at least two aspects of air travel. First, as this Court in Williams said:

> "One of the greatest hazards besetting the commercial transportation of passengers in the past fifteen years has been the hijacking of passenger planes. Many lives

> have been lost and much suffering has been caused by this piratical practice, not to mention the disruption of plans and the frustrations, inconveniences and losses visited upon hundreds of people." Williams v. TWA, supra, slip Op. at 1268.

One need not have a vivid imagination to foresee what peril would exist if a shipment of special nuclear material, such as plutonium, were to be pirated by a terrorist group, or, even if a single hijacker were to pirate a plane not knowing such substances were aboard. The important factor to remember here is that only an incredibly small amount of many of these radioactive substances is needed to bring about cataclysmic results.

Secondly, if a plane load of nuclear materials were to crash or were involved in a mid-air collision in a major metropolitan area such as New York, the consequences again could be catastrophic. As mentioned earlier a single accident involving certain nuclear materials could possibly disperse trillions of lethal particles over a wide area in a very short period. The end result would be untold thousands, perhaps millions of people dead or physically impaired and large sectors of the metropolitan area contaminated for thousands of years to come.

Even if non-pharmaceutical/non-research nuclear materials are banned from airlines as transportable materials,

it does not mean that there are no alternative modes of transportation available for the shipment of such nuclear materials. Such cargo could be adequately handled by rail, truck, and ship without an interruption in the flow of these shipments. A decision in favor of petitioners would simply mean that with some exception, nuclear materials would no longer be transported by commercial aircraft when in the judgment of the airlines or pilots such shipment would be inimical to flight safety.

## CONCLUSION

THE ORDER APPEALED FROM SHOULD BE VACATED

Dated: New York, New York
April 8, 1975

Respectfully submitted,

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: SS.:
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ROSE ANN BATTISTA, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, the attorney for Intervenor State of New York herein. On the 8th day of April, 1975, she served the annexed upon the following named persons:

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Attorneys in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Rose Ann Battista
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Sworn to before me this
8th day of April, 1975

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